No. 3745

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff, Appellant,

vs.

BHAGAT SINGH THIND,
Defendant, Respondent.

BRIEF OF APPELLANT.

Upon Appeal From the United States District Court for the District of Oregon.

LESTER W. HUMPHREYS,
United States Attorney for Oregon.
For Appellant.

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STATEMENT.

Bhagat Singh Thind was naturalized in the District Court at Portland, November 18, 1920. He is a native of India, of full Indian blood, and was born at Amrit Sar, Punjab.

After his naturalization, the United States filed a bill in equity to cancel his citizenship on the ground that it was illegally procured, in that the applicant, being a Hindu, was not entitled under the naturalization laws to citizenship.

Thereafter he appeared by counsel and filed a demurrer to the bill. This was treated at the argument as a motion to dismiss, and an order dismissing the bill was made for the reason "that said bill seeks cancellation of defendant's citizenship on the ground that said defendant is a Hindu, and a native of Punjab, India, and it further appearing that a Hindu is entitled under the laws of the United States to admission to citizenship." (Trans. 10.)

This is an appeal from the dismissal of the bill.

SPECIFICATION OF ERROR.

I.

The Court erred in sustaining defendant's motion to dismiss plaintiff's bill of complaint.

II.

The Court erred in ruling that the defendant was

entitled under the law to naturalization as a citizen of the United States.

POINTS AND AUTHORITIES.

I.

Under Section 15 of the Naturalization Act, a certificate of citizenship granted by the court on a state of facts showing the petitioner not qualified for citizenship, is subject to be annulled in an independent suit by the United States as being illegally procured.

U. S. vs. Ginsberg, 243 U. S. 472-475.

U. S. vs. Mulvey, 232 Fed. 513.

II.

A Hindu can not be naturalized unless he be a "free white person."

Section 2169 R. S.

III.

Hindus are not "white persons" within the meaning of the statute.

In re Sadar Bhagwab Singh 246 Fed. 496.

Ex parte Shahid 205 Fed. 812.

Ex parte Dow 211 Fed. 486.

Ex parte Dow 213 Fed. 355.

Contra:

In re Mohan Singh 257 Fed. 209.

Dow vs. U. S. 226 Fed. 145.

U. S. vs. Balsara, 180 Fed. 694.

In re Akhay Kumar Mozumdar 207 Fed. 115.

In re Bhagat Singh Thind 268 Fed. 683.

Other cases discuss the question who are "white persons."

In re Ah Yup 5 Saw. 155; 1 Fed. Cas. No. 104.
In re Camille 6 Fed. 256.
In re Saito 62 Fed. 126.
In re Ellis 179 Fed. 1002.
In re Halladjian 174 Fed. 834.
In re Mudarri 176 Fed. 465.
In re Young 198 Fed. 715.

IV.

Naturalization laws are not in derogation of common right; they should not be strictly construed against the United States, but rather against the alien.

U. S. vs. Rodgers, 185 Fed. 334-338.

V.

An alien has no right to be naturalized except by statutory grant.

Zartarian vs. Billings, 204 U. S. 170-175.
Lapina vs. Williams, 232 U. S. 78-88.
U. S. vs. Ginsberg, 243 U. S. 472-475.

VI.

An alien residing in the United States has no vested right to remain. He is here as a matter of pure permission, of simple tolerance.

Colyer vs. Skeffington, 265 Fed. 17-23.
Fong Yue Ting vs. U. S. 149 U. S. 698-708.

VII.

It is not enough that the applicant for citizenship be a "white person"; he must also be a person not within the classes excluded by the immigration laws.

2 Corpus Juris 1114.
In re Rustigian 165 Fed. 980-983.

VIII.

Hindus are excluded from entry into the United States.

39 Stat. L. 875; Sec. 3 Act of Feb. 5, 1917.

IX.

The object and purpose of exclusion acts is to protect the country from the advent of aliens whose race or habits render them undesirable as citizens.

Wong Wing vs. U. S., 163 U. S. 228-237.

X.

Reports of Committees in Congress may be considered in construing Acts of Congress.

Lapina vs. Williams, 232 U. S. 78-90.

XI.

The exclusion section of the Act of Feb. 5, 1917, was aimed specifically at the Hindus.

Vol. 1 House Reports, 64th Cong., 1 Sess., H. Rep. 95.
Vol. 2 Senate Reports, 64th Con., 1 Sess., S.

Rep. 352.

Vol. 1 House Reports, 64th Cong., 2 Sess., Conf. Rep. 1266-1291.

XII.

All statutes must be given a reasonable construction with a view to effecting the objects and purposes thereof.

Low Wah Suey vs. Backus, 225 U. S. 460-475.

XIII.

Any doubt as to whether an alien is entitled to naturalization should be resolved in favor of the Government.

U. S. vs. Griminger, 236 Fed. 285.

XIV.

Courts are without authority to sanction changes or modifications in the naturalization laws; "their duty is rigidly to enforce the legislative will in respect to a matter so vital to the public welfare."

U. S. vs. Ginsberg, 243 U. S. 472-474.

ARGUMENT

Defendant's demurrer to the bill, which was treated at the argument as a motion to dismiss, challenges the right of the United States to attack defendant's admission to citizenship by a bill in equity. This suit is based on the proposition that defendant's citizenship was "illegally procured," in that the trial

judge erred in applying the law and the facts. His specific error was in holding a Hindu eligible to citizenship.

There is abundant authority for this proceeding, as a means of challenging that ruling, in the case of U. S. vs. Ginsberg, 243 U. S. 472. One of the questions there certified by the Circuit Court of Appeals for the Eighth Circuit was this:

> "May a certificate of citizenship be set aside and canceled in an independent suit brought under Section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?"

In answering this question in the affirmative, the Supreme Court said (page 475):

> "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon the condition that the Government may challenge it as provided in Section 15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these or render their existence non-essential."

A like decision is reported in U. S. vs. Mulvey, (2CCA) 232 Fed 513.

Is a Hindu White?

This brings us directly to consider the correctness of the admission of a Hindu to citizenship; and the first question is whether he is a white person within the statute. In admitting this defendant Judge Wolverton filed an opinion reported at 268 Fed. 683.

Those courts which have admitted the Hindu adopt this reasoning: "White persons" means the Caucasian race; the Hindu is Caucasian; therefore he is white.

Who are the "white persons" spoken of in the statute (2169 RS)? This question has been considered by many courts; sometimes answered, sometimes evaded. No other question has been examined with so much careful, often brilliant, ability, and with such bewildering confusion of results. "There have been a number of cases in which the question has been treated, and the conclusions arrived at in them are as unsatisfactory as they are varying" (Ex parte Shahid 205 Fed. 812.)

The temptation is strong simply to "dump them into the lap of the court" without comment. This is so because the cases are so hopelessly in conflict, both in reasoning and result, that they cannot possibly be reconciled. It is utterly impossible to secure from them a clear legal rule or principle as a guide. Judge Lowell's opinion (In re Halladjian 174 Fed. 834) gives the inquiry elaborate discussion. It reviews two

centuries of ethnological authority, with state and federal statutes, publications of the government, and census reports, and concludes that there isn't such a thing as a "white race" and expresses the hope that Congress may lend its assistance in determining so perplexing a question.

The two most recent cases alike involve the admissibility of the Hindu. (In re Mohan Singh 257 Fed. 209; In re Sadar Bhagwab Singh 246 Fed. 496.) Here two District judges, with the same question before them, and the same authorities, reach exactly opposite conclusions.

Learned judges have considered the matter from every angle, only to flounder helplessly in the mazes of ethnological theory to indefinite and unsatisfactory conclusions.

Decisions by Circuit Courts of Appeals are the following: Bessho vs. U. S., 178 Fed. 245; U. S. vs. Balsara, 180 Fed. 694; Dow vs. U. S., 226 Fed. 145. The matter has never been presented to the Supreme Court for decision.

In point of number, a majority of the courts, including the courts of Appeals of the Second and Fourth Circuits, are committed to the proposition that "white persons" means the Caucasian race. The criticisms of this theory will be stated presently. Other courts have reached these several conclusions: that "white persons" means the European races and their descendants (Ex parte Shahid 205 Fed. 812; Ex parte Dow 211 Fed. 486; 213 Fed. 355) that it means all European races and those Caucasians

belonging to the races around the Mediterranean Sea (In re Young 198 Fed. 715) that the statute should be amended to make its meaning clear (In re Mudarri 176 Fed. 465) that it means all persons not otherwise classified (In re Halladjian 174 Fed. 834) that Hindus are not within the classes to whom Congress extended the gift of citizenship (In re Sadar Bhagwab Singh 246 Fed. 497.)

The statute is declared to be "most uncertain, ambiguous, and difficult, both of construction and application." (205 Fed. 812). Its language is as follows:

> "2169 RS. The provisions of this title shall apply to aliens being free white persons; and to aliens of African nativity and to persons of African descent."

This statute was first enacted in 1790. (1 Stat. L. 103-104). In 1873, at the time of the first revision, the words "being free white persons" were omitted, undoubtedly through inadvertance. The act of February, 1875, to correct errors and supply omissions in the first revision, restored the omitted words. The phrase including Africans is one of the phenomena growing out of the Civil War. The history of the legislation is detailed in many of the cases, beginning with re Ah Yup 5 Saw. 155-157; 1 Fed. Cas. No. 104.

As a matter of first impression, one might be inclined to say that "white persons" are Caucasians—seeking to solve the riddle by adopting a supposed synonym instead of a definition.

But, as has been noted, the statute was enacted in 1790. The "Caucasian race" first appeared in the English language 17 years later—and that in England—in a London translation of a work of the German ethnologist, Blumenbach, who coined the word. This translation was published in 1807. Use of the "Caucasian race" in the United States is first noted about 1830, forty years after the date of the statute.

Yet the supposed synonym would not be so indefensible if any one knew what Caucasian means. We find the ethnologists and lexicographers in as much confusion and bewilderment about the Caucasian race as are the courts about "white persons." The origin of the phrase is thus explained, 6 The Americana 126:

> "Caucasian race; a term introduced into ethnology by Blumenbach . . . Blumenbach believed this to be the original race from which the others were derived and he gave it the epithet of Caucasian because he believed, probably erroneously, that its most typical form—which was also that of man in his highest physical perfection—was to be met with among the mountaineers of Caucasus."

Blumenbach and his invention have been ridiculed by Huxley, Latham and the Encyclopedia Britannica, (In re Dow 213 Fed. 358-359; reversed 226 Fed. 145:)

> "Of all the odd myths that have arisen in the scientific world, the 'Caucasian Mystery' invented quite innocently by Blumenbach is the oldest. A Georgian woman's skull was the handsomest

in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as derivations; and out of this, by some strange intellectual hocus-pocus, grew up the notion that the Caucasian man is the prototypic 'Adamic' man and his country the primitive center of our kind."

* * * * * * *

"The ill chosen name of Caucasian invented by Blumenbach in allusion to a South Caucasian skull of especially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays who are set down as two distinct races."

Thus the courts which have adopted the Caucasian solution are committed to a word coined after Congress had written the words "white persons" into the statute; are committed to following ethnological theorists in their gropings in the mists and fogs that enshroud prehistoric man, there to try to spell out his origin; and are making the test of American citizenship to depend upon the symmetries of the skull of a woman found by Blumenbach in the mountains of Caucasus or elsewhere; or upon the origin of the native language of the applicant.

No more technical definition of the words "white persons" could well be imagined than to adopt the terms of the ethnologists. Yet the rule is not disputed that the words of a statute are to be taken in their ordinary sense, unless it can be shown they were used in a technical sense (In re Saito 62 Fed. 127;

In re Camille 6 Fed. 256; In re Ah Yup 5 Saw 155)

It is clear that the word Caucasian was not known when Congress passed the statute containing the words "white persons." It came later. Therefore Congress did not intend "white persons" to mean Caucasian; unless it be held, as was done in the Fourth Circuit, (Dow vs. U. S., 226 Fed. 145) that the statute must be construed with reference to the meaning of the words "white persons" at the time of the re-enactment in 1873 and 1875. The better rule as to this appears to be that stated by Judge Bledsoe (In re Mohan Singh 257 Fed. 209) "In any event the debates in Congress at the time seem to indicate that the action taken in 1875 was taken merely to correct an obvious inadvertence, and therefore, in truth and in fact, it would seem as if the section should now be construed as if the unintentional repeal in 1874 had never occurred."

If "white persons" means Caucasians, then any one not a Caucasian is not eligible to citizenship. Finns and Magyars are not Caucasians. Jews are Semitic or Aryan, and may be Caucasian or not, depending on the turn taken by ethnological theory at the moment. Yet all three, Finns, Magyars, (both Mongolian) and Jews are commonly regarded as white and as such are naturalized.

Again, the term Caucasian, if the opinion of ethnologists may be said to be settled on anything, has now a meaning very different than it had when Blumenbach first coined it and sent it out to startle a

scientific world. From that day to this, its meaning has constantly varied. "Ethnological theories have varied greatly and at short intervals . . . Race, in the present state of things, is an abstract conception" (In re Halladjian 174 Fed. 834-840) To adopt Caucasian as a synonym for "white persons," therefore, is to make qualification for citizenship depend upon the changing opinion of the scientists as to what Caucasian means.

The only theory which will admit the Hindu is the Caucasian. If Congress when it said "white persons" did not mean Caucasians, then no provision for the naturalization of the Hindu was made.

I submit that the Caucasian theory is wrong for the following reasons:

It adopts, not a definition, but a synonym, which is in fact not a synonym at all.

It shifts from the difficulty of defining "white persons" to the greater difficulty of defining Caucasian.

It substitutes a scientific phrase of vague and uncertain meaning for the language used by Congress.

It substitutes for the language of Congress an expression not known in America until forty years after the statute was passed.

It puts upon the statute a technical meaning when every principle of statutory construction requires the words to be taken in their ordinary sense.

It makes naturalization depend upon the ever changing meaning given by ethnologists to Cauca-

sian; denying uniformity to the qualifications for citizenship.

To attempt further comment on the various decisions would involve useless repetition. Even the reasoning stated in them does not lend itself to classification, for different courts appear by the same process of reasoning to have reached different results. Probably the only thing that can be done, after considering the opinions, is to choose the one which most strongly commends itself to the sound judgment of the court. If the rule to be adopted is that to which the greater number of the courts have adhered, the result is to naturalize the Caucasian race, with its attendant difficulties.

I earnestly commend to the consideration of the court the strong opinions of Judge Smith, which must be read together (Ex parte Shahid 205 Fed. 812; Ex parte Dow 211 Fed. 486; 213 Fed. 355) notwithstanding the reversal by the Fourth Circuit (226 Fed. 145) This reversal is based on the proposition that the meaning of the statute must be that current at the time of the re-enactment of 1875; the weakness of which ruling lies in ignoring the fact that Congress never intended to repeal the condition as to "white persons," but that it was omitted inadvertently in compiling the Revised statutes, and was restored in 1875 on the omission being noted; and further Congress intended in 1875 that in restoring the words "white persons" Asiatics would be excluded from naturalization, and the amendment was adopted with

this understanding of its effect (In re Saito 62 Fed. 127)

The conclusions of Judge Smith are:

"After considering them all in an attempt to evolve, if possible, some definite rule for judicial decision, the conclusion that this court has arrived at is as follows: that the meaning of free white persons is to be such as would naturally have been given to it when used in the first naturalization act of 1790. Under such interpretation it would mean by the term 'free white persons' all persons belonging to the European races, then commonly counted as white, and their descendants. It would not mean a 'Caucasian' race; a term employed only after the date of the statute and in a most loose and indefinite way (205 Fed. 814.)

"In 1790 the distinctions of race were not so well known or carefully drawn as they are today. At that date all Europeans were commonly classed as the white race, and the term 'white' person in the statute then enacted must be construed accordingly. (Id 815)

"In the face of all these difficulties it is safest to follow the reasonable construction of the statute as it would appear to have been intended at the time of its passage, and understand it as restricting the words 'free white persons' to mean persons as then understood to be of European habitancy or descent (Id 815.)

"If the people of the United States, through their representatives in Congress, see fit to exclude by law from citizenship the most worthy and spiritual inhabitants of the globe, it is not for the courts by judicial legislation to gainsay that

law, and substitute for it what in their opinion may be more appropriate and reasonable legislation (Id. 816)."

The Exclusion Act

The effect of the Hindu Exclusion Act is to bar Hindus from citizenship on either of two theories, (1) the applicant is not eligible for naturalization if he is within a class excluded by the immigration laws, or (2) the exclusion act operates as an implied amendment pro tanto of the general statute (2169 RS) conferring naturalization on "free white" aliens. In the court below this second theory was discussed as an implied repeal and was rejected (168 Fed. 683).

In general it may be said that all statutory construction in naturalization cases must be strict in favor of the United States and against the alien. The controlling principle which lies at the foundation of every case must be the inquiry what is required by the best interest of America; and not what is advantageous to the individual alien applicant.

Without a statutory grant, no alien could be naturalized (Zartarian vs. Billings, 204 U. S. 170-175.) "The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country." (Lapina vs. Williams, 232 U. S. 78-88.) "The right of aliens to acquire citizenship is purely statutory. Laws regulating and restricting such admission are not in derogation of common right, and

there is therefore no rule of strict construction to be applied to these statutes as against the United States, in favor of one seeking such admission. On the contrary, an applicant for admission to citizenship must show strict compliance with the conditions imposed by law upon his admission" (U. S. vs. Rodgers, 185 Fed. 334-338.) "There is no constitutional limit to the power of Congress to exclude or expel aliens. An invitation once extended to the alien to come within our borders may be withdrawn. He has no vested right to remain." (Colyer vs. Skeffington, 265 Fed. 17)

Whether the Hindu here involved be held to be a white person or not, he was not qualified to become a citizen for the reason that since 1917 his race has been barred by the immigration laws of the United States. This exclusion statute per se operates to disqualify the defendant, notwithstanding his prior lawful entry into the United States. For if Congress has said that Hindus are not wanted in the United States at all, how can the courts say that those already here are desirable material for citizenship? This is a matter "vital to the public welfare." Does such a conclusion serve the public welfare? Is it that rigid enforcement of the legislative will required by U. S. vs. Ginsberg, 243 U. S. 472-474?

The rule is thus stated in Corpus Juris (2 C. J. 1114.)

> "But it is not enough that the applicant for naturalization comes within this classification (free white persons). **He must also be a person**

not within the classes excluded by the immigration laws."

The same language is used In re Rustigian 165 Fed. 980-983.

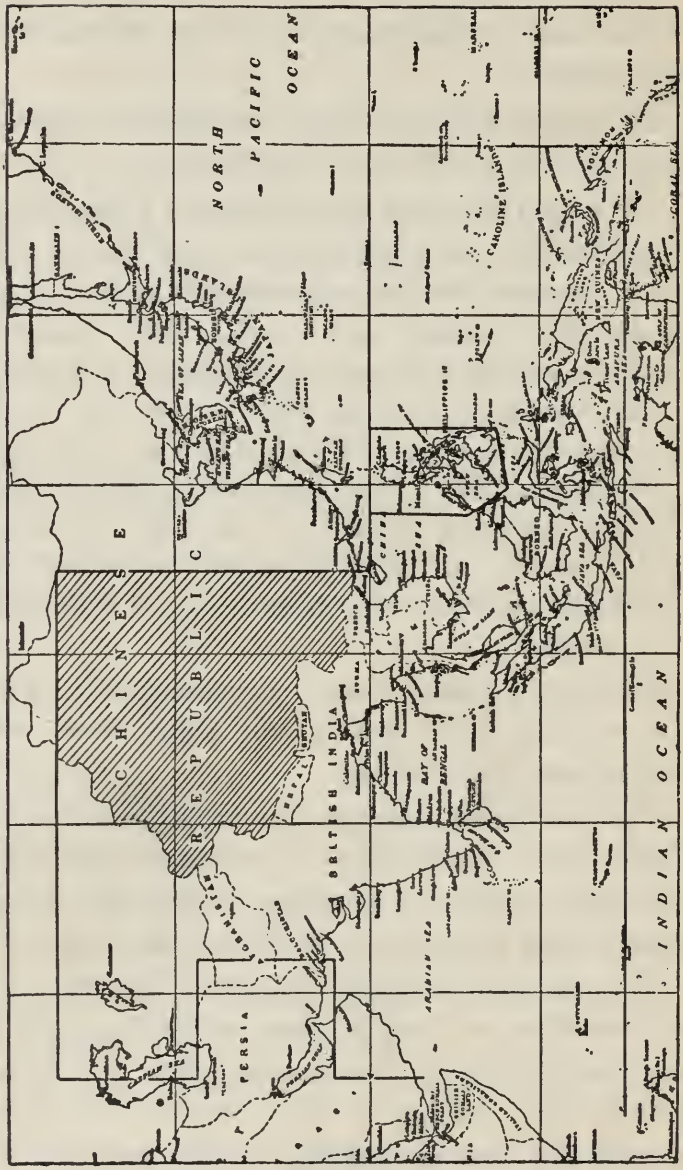
The Hindu exclusion act is contained in the act of February 5 1917 (39 Stat. L. 875) Sec. 3:

> "That the following classes of aliens shall be excluded from admission into the United States . unless otherwise provided for by existing treaties, persons . . . who are natives of any country, province, or dependency situate on the continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from greenwich, and south of the fiftieth parallel of latitude north, except that portion of said territory (describing the Philippine Islands.)

For convenience a map is reproduced on page 20, showing those parts of Asia from which immigration is forbidden.

This exclusion act was aimed specifically at the Hindu. This is shown to a demonstration by the Committee reports in Congress, which may properly be consulted, (Lapina vs. Williams, 232 U. S. 78-90).

The House Committee reported the bill with a recommendation that it pass, with this comment touching Section 3: "Hindus, by name, are added to the excluded classes by this section. So are those who cannot become eligible to become naturalized citizens of the United States." (Vol. 1 House Reports, 64th Cong., 1st Sess., H. Rep. 95.) The bill



MAP SHOWING ASIATIC ZONE PRESCRIBED IN SECTION THREE OF IMMIGRATION ACT. THE NATIVES OF WHICH ARE EXCLUDED FROM THE UNITED STATES, WITH CERTAIN EXCEPTIONS.

(Portions colored by diagonal lines covered by treaty and laws relating to Chinese. The Philippine Islands are United States possessions and therefore not included in barred zone.)

then went to the Senate, where it was amended by substituting a description of territory in Asia for the designation of Hindus. (Vol. 2, Senate Reports, 64th Cong. 1st Sess. S. Rep. 352.)

In Conference Committee the Senate Amendment was agreed to, and the House Conference members made this report: "The managers on the part of the House agree to so much of this amendment (inserted by the Senate Committee on Immigration) as substitutes for the provision contained in the bill as passed by the House excluding Hindus and persons who cannot become eligible for naturalization a provision excluding aliens who are natives of certain islands and mainland territory of Asia defined by longitudinal and latitudinal lines" (Vol. 1, House Reports 64, Cong. 2nd Sess., Conf. Rep. 1266-1291.) This report was made 13 January, 1917, just before the passage of the Act, which was then vetoed because it contained the "literacy test", and was passed notwithstanding the veto, by the House February 1, 1917, and by the Senate February 5, 1917.

The purpose to exclude Hindus is borne out by the debates, which have not the force of Committee reports, but do in fact corroborate them (Cong. Rec. 64, Cong. 2nd Sess., pt. 1, page 221.)

Senator Lodge:

> "The only change from the bill which was vetoed was the insertion of the word 'Hindus'—Hindus and persons who cannot become eligible under existing law. The purpose of that was to exclude Asiatic immigration, Mongolians

having been held by the Courts to be not eligible to naturalization. The House put in the word 'Hindus' because there might be some doubt about it. . . . Therefore, instead of describing the excluded persons as those not eligible for naturalization or by the word 'Hindus', the Committee took the same people within geographical lines and excluded them."

These quotations also show the legislative view that Hindus are not and were not eligible for citizenship.

"All Statutes must be given a reasonable construction with a view to effecting the object and purposes thereof." (Low Wah Suey vs. Backus, 225 U. S. 460-475.)

It is confidently affirmed that the legislative purpose concerning Hindus is not effected by admitting them to citizenship.

The fact that Bhagat Singh Thind, when he applied for naturalization, was within a class excluded by the immigration laws, operated under the authorities above quoted to disqualify him for naturalization. His application should have been denied on that ground. When Congress said that the Hindu is undesirable to such a degree that he is denied entry into the country, the result is that he is not desirable nor qualified to become a citizen.

His prior lawful entry gave him no vested rights.

"He is none the less an alien because of his having a commercial domicile in this country. Lem Moon Sing vs. U. S. 158, U. S. 538-547.) "An invitation once extended to the alien to come within our borders may be withdrawn." (Colyer

vs. Skeffington, 265 Fed. 17.) "None of these excluded classes would be any less undesirable if previously domiciled in the United States." (Lapina vs. Williams, 232 U. S. 78-92.) "It seems entirely unreasonable to hold that it was the intention of Congress to confer American citizenship upon an alien who is excluded by the immigration acts from admission to the country." (In re Rustigian, 165 Fed. 980-983.)

An alien must find his right to naturalization in a grant of Congress. Bhagat Singh Thind must show that he is one of those whom Congress intended to be citizens. The exclusion act of 1917 demonstrates conclusively that Congress intended that thenceforth no Hindu should enter the United States, much less be a citizen. Had this defendant left the United States, he could not re-enter—to such a point was he undesirable in the view of Congress. Where, then, are the indicia of intention that by remaining within our country he should be rewarded with the privileges of citizenship. The burden is on the alien to show such intention, and not upon the United States to show the absence of it.

Implied Amendment or Repeal

Legislation touching immigration and naturalization should be, and is, read together in order to determine the eligibility of aliens to citizenship. It is a familiar rule that no alien who has entered the United States in violation of the immigration laws can be naturalized. But an effort will be made in behalf of the defendant to establish the proposition that

when an alien has lawfully entered, later exclusion acts can not affect his eligibility to citizenship.

What is the present status of the Hindu who entered prior to 1917? This question is answered in Fong Yue Ting vs. U. S., 149, U. S. 698-708:

> "The foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation."

Apply this to the Hindu here in question. After the exclusion act he continued to reside here as a matter of pure permission; he stayed on here by simple tolerance, which created no obligation. He continued to be an alien, and the stamp of undesirability put upon his kind by Congress, remained upon him. Shall he be allowed to squirm into citizenship through a hole between the statutes, which may be opened by a strict construction against the United States?

It will be contended for the Hindu that immigration and naturalization are distinct and unrelated subjects, and that legislation dealing with the immigrant can have no effect upon the applicant for citizenship. Such a view would be improper. The subject relates to the single idea of the transition of the alien from his native soil to American citizenship.

The primary purpose of allowing any immigration at all is to enrich the American nation—not in money or material resources, but in men. It is recognized that there are many aliens who, transplanted, would be splendid citizens. When they have come

and have proved their desirability, they are naturalized. The primary purpose of this also is to enrich the American nation—not in money or material resources, but in men. That immigration and naturalization have this common fundamental purpose is recognized by the language of Mr. Justice Shiras (Wong Wing vs. U. S., 163 U. S. 228-237): "No limits can be put by the courts upon the power of Congress **to protect . . . the country from the advent of aliens whose race or habits render them undesirable as citizens.**"

In the transition of the alien to citizenship, he must pass through two doors, viz.: immigration and naturalization. They are successive points on the same road; they lead to the same end. Both lie between the alien and citizenship, but at different points in his progress. Immigration and naturalization are as like in their functions as the front and hind wheels of a wagon.

This identity of purpose is recognized in the title of the act of June 29, 1906, commonly known as the Naturalization Act (34 Stat. L. 596), "An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States." Each of the houses of Congress has a standing "Committee on Immigration and Naturalization" to which pertinent matters are referred.

Further evidence of this identity of purpose is given by the report of the House Committee on Immigration and Naturalization in submitting the Act

of February 5, 1917, when it said:

> "The committee has labored earnestly in its efforts to keep out the most undesirable of those coming to our shores, and at the same time encourage the immigration of **those who come to make their homes with us . . . and to become permanent citizens of our great government.**" (Vol. 1, House Reports, 64 Cong. 1st Sess. H. Rep. 95.)

Congress, then, has appointed two servants of the government to deal with aliens; the one is Immigration, and she stands at the door which is at the port of entry through which the alien must pass; and her sister is Naturalization, and she stands at the other door which opens upon full participation in the rights and duties of American citizenship, and her interpreter is the Court.

Congress, speaking of the Hindu, has said to Immigration: "This people is hateful in our sight and an abomination in the land; shut ye the door against them." Shall the courts now say to Naturalization, interpreting the words of Congress touching the Hindu: "This people is pleasing to our sight and a blessing to our nation; open ye the door to them; clothe them with the mantle of our citizenship"?

The rule is that repeals by implication are not favored, and **usually** occur only when there is such irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both. (Washington vs. Miller, 235 U. S. 422-428.)

Therefore, is the conflict irreconcilable? How can we reconcile the attitude of coldly turning our

back upon the Hindu without our gates, at the same moment cordially to open our arms to the Hindu within them? To do so certainly requires strict construction against the United States, and such construction is improper. Effect cannot reasonably be given to both these statutes. To hold there is no manifest repugnancy is to confer citizenship upon aliens clearly classed as undesirable for that privilege —it is bestowing citizenship upon a people whom Congress clearly does not mean to have that gift. As said in Re Rustigian, 165 Fed. 980-983, "It seems entirely unreasonable to hold that it was the intention of Congress to confer American citizenship upon an alien who is excluded by the immigration acts from admission to the country."

It will be argued that if Congress intended to prevent the naturalization of Hindus it would have said so, in terms. This is an argument for strict construction against the United States and in favor of the alien. This legislation is not in derogation of common right; there is no rule for this sort of strict construction (U. S. vs. Rodgers, 185 Fed. 334). No person who is denied admission to the United States can be naturalized. Congress could not more effectively prevent the naturalization of Hindus than it has done by closing the ports of entry to them, and the committee reports show that such was the intention.

But Congress did not say that those who had then entered should be deported; from that it will be ar-

gued that they should be naturalized. This again is strict construction against the United States and in favor of the alien; and the conclusion is not logical. The alien is seeking a gift—the privilege of citizenship. Because Congress has not said he must be deported, the Hindu who was here prior to 1917 may remain; but that is far from expressing an intention that he may also be naturalized. And it is beyond the proper function of the Courts to read such an intention into the statutes. As said by the Supreme Court in U. S. vs. Ginsberg, 243 U. S. 472-474:

> "An alien who seeks political rights as a member of the nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is **rigidly to enforce the legislative will in respect to a matter so vital to the public welfare.**"

The courts may, therefore, examine the statutes and yield to the alien such concessions as are there expressed; but the courts may not, in the matter of citizenship, yield anything not expressed in the statute. The expressions of the statute should be examined as a matter "vital to the public welfare"—and that does not mean vital to the welfare of the alien. In case of doubt, such doubt ought to be resolved against the alien and in favor of the public welfare.

These considerations lead to the conclusion that the Hindu is not lawfully entitled to citizenship; and the application of Bhagat Singh Thind ought to have been denied. Therefore his certificate ought to be

cancelled as having been illegally procured, and there was error in the dismissal of the government's bill for such cancellation.

Respectfully submitted,

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